MAIN THEME: MAKING AND BREAKING THE LAW: JUSTICE IN THE WAKE OF DISOBEDIENCE AND JUDICIAL COWARDICE

JUDICIAL INNOVATION OR SCHIZOPHRENIA? A SURVEY OF EMERGING KENYAN JURISPRUDENCE

PRESENTATION OUTLINE

By

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Caveat: This is not an academic Paper. It is an outline of a presentation made to Legal Practitioners to provoke debate on trending Legal Issues

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BRIEF PROFILE OF THE SPEAKER

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He is an Advocate of the High Courts of Kenya and Tanzania. He is a holder of Bachelor of Laws and Master of Laws degrees from the University of Nairobi and a LL.D from the University of Ghent, Belgium. He is Certified Public Secretary CPS (K) and a Member of the Kenya Institute of Management (MKIM).

He has been trained on Humans Rights at the Institute of Advanced Legal Studies University of London in England and at the Raoul Wallenberg Institute of the University of Lund in Sweden and on International Humanitarian Law in Geneva, Switzerland.

He is a renowned legal practitioner. He is a former Secretary of the Constitution of Kenya Review Commission and former **Director of the defunct Kenya Anti-Corruption Commission, (KACC).**

He is also the Founder of the **PLO – Lumumba Foundation** (a Philanthropy Organization); founding Trustee of the African Institute for Leaders and Leadership (AILL) and founding **Chairman of the Association of the Citizens Against Corruption (ACAC).**

He was recognized by the Kenya-USA Association for the Martin Luther King Jnr., Leadership Award in 1996 and was the recipient of the 2008 Martin Luther King Africa Salute to Greatness Award by the Martin Luther King Jr. Africa Foundation. He has also been included in the Marquis Who's Who in the World and is the Distinguished Mwalimu Nyerere Lecturer for 2014.

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ABSTRACT

The doctrine of separation of powers has for many centuries served as the foundation for democracy. It is not only a symbol of the existence of respect for the rule of law but also an indication of the value that a democratic society places on the need for consultation and compromise in national decision making processes. The raison detre of separation of powers is to ensure that power and authority is not vested solely on an individual or an Institution thereby avoiding political absolutism.

Political power is divided between arms of Government which are distinct in nature but work together to ensure the smooth running of Government, with a system of checks and balances which limit the powers of each arm and ensure that excesses are curtailed.

The Kenyan Government has a partial Separation of Powers. It distinguishes between three arms: the Executive, the Legislature, and the Judiciary. The Legislative branch enacts laws, the Executive branch enforces, and the Judicial branch adjudicates.

If one arm or Institution had all the three powers, it would have unlimited power to the detriment of the society; a fortiori, separation of powers ensures that the three branches of Government perform their duties independently, thus safeguarding freedom, and preventing the abuse of power.

In this arrangement Judicial independence stands out as the cornerstone of the rule of law. The judiciary must be detached from politics and be free from parliamentary, administrative and executive interference. This was aptly captured in The Queen v. Beauregard1 where it was stated inter alia that the role of the Courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and

function from all other participants in the justice system.

The current constitutional dispensation in Kenya "creates a window of opportunity" for the Judiciary to address the problems that have frustrated the delivery of justice for many years. Article 1 of the Constitution 2010 bestows sovereign power in the people. When read together with Article 2, it enshrines the spirit of constitutionalism which restrains the Government from totalitarianism.

Institutional independence is enforced to ensure security of judicial officers against any external pressure that may jeopardize administration of justice. Judicial independence is

entrenched by Article 160 of the Constitution 2010. Article 159 of the Constitution establishes a fundamental principle, that judicial authority is derived from the people. This authority must therefore be exercised with the sole objective of fulfilling the aspirations of the People as espoused in the Constitution.

In this short presentation we attempt an assessment of the Judiciary's performance since the promulgation of the Constitution of Kenya 2010 to determine whether in arriving at a myriad of decisions judicial officers have exhibited consistency and depth that heralds innovation or they have been eclectic and inconsistent and ipso facto schizophrenic.

Structure of the Paper:

1. Introduction

As has been succinctly stated by the Hon. Justice (Prof.) Jackton B. Ojwang'

What is special as regards the Judiciary as the bearer of the people's mandate is that it is the primary and ultimate arbiter, when the operations of the several public bodies run into conflict; it is the dominant interpreter not only of the totality of the Constitution, but also of all other laws applying in the land… Notable as a central theme of the Constitution constantly falling within the judicial mandate is its longest chapter, on the Bill of Rights. The Bill of Rights indeed, is the main bond in the Constitution that creates the integrality of the judicial function and the processes of governance.

The current Constitution was promulgated against the backdrop of widespread public concern over the performance of the Judiciary over the years. The people of Kenya aspired for an

independent, efficient and impartial Judiciary. The outcome in this regard was the transitional provision in Section 23 of the Sixth Schedule of the Constitution which provides that all Judges and Magistrates, who were in office on the effective date of the Constitution (27th August, 2010) be vetted on their suitability to continue to serve in the Judiciary.

The Judges and Magistrates Vetting Board, was therefore established as a result of the *Vetting of Judges and Magistrates Act, 2011*, which was passed by Parliament to create the necessary institutional framework and guidelines for the vetting of Judges and Magistrates. Judges and Magistrates appointed after the promulgation of the Constitution were appointed after vetting by the Judicial Service Commission in accordance with the Constitution.

To its credit, the 'reforming' Judiciary has presided over a number of cases touching on diverse areas such as human rights, environment and land, election petitions and other areas such as the Attorney General's engagement in 'extra Governmental' cases. In addition, the Judiciary has demonstrated a new attitude towards the requirement for *locus standi* in institution of public interest litigation cases. This attitude shift is exemplified by the increasing involvement of the Law Society of Kenya (LSK) in public interest litigation (PIL) and other public spirited persons such as Okiya Omtatah Okoiti, Aluoch Polo Aluochier and Charles Omanga.

In this short article we sample a few cases in our attempt to answer the question whether episodic innovation and bravery demonstrated in a number of judgments is undermined by what presents

itself as extreme restraint to the point of timidity, particularly in election petitions, exhibiting duplicity or to use a medical term 'schizophrenia'. In doing so, the presentation covers these issues: *locus standi*, enforcement of fundamental rights and freedoms, role of the AG in extra Governmental litigation, election petitions and interlocutory appeals in election petitions.

2. The Emerging Kenyan Jurisprudence: A Sampling of Cases

a. The Issue of Locus Standi

Since the promulgation of the Constitution of Kenya 2010, Kenyan Courts have demonstrated admirable boldness in giving standing to organizations and individuals who in the past would have been shut out as busy bodies as was the case in *Maathai v Kenya Times Media Trust Ltd*3 and *Law Society of Kenya v Commissioner of Lands & 2 others*,**4** thus giving the Latin maxim of *action popularis* its pride of place. The Kenyan Constitution 2010 has generous provisions on

legal standing, allowing a broad range of individuals and groups to enforce the rights in the Bill of Rights.5 For example, it expressly confers standing on anyone acting on behalf of another person who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons, as well as anyone acting in the public interest. A sampling of a few decisions will lend credence to the new dispensation

brought a suit against the Commissioner of Lands (1st Defendant), Lima Ltd (the 2nd Defendant) and Usin Gishu Land Registrar (3rd Defendant). It claimed that the 1st Defendant had unlawfully allocated certain land which was held by the Government in trust for

its members and the public generally. The Plaintiff averred further that by dint of Section 3 of the Law Society of Kenya Act, it had the legal right to sue on behalf of 100 of its members in Eldoret and similarly on behalf of other members of the legal profession in Kenya and members of the public in general.

Despite the provisions of Section 3(3) of the Environmental Management and Co-ordination Act (EMCA) which gives standing to anybody, the Court held that the Plaintiff lacked individual right in the preservation of the subject matter.

The decision of the Court in the 2010 case of *Priscilla Nyokabi Kanyua v Attorney General and the Interim Independent Electoral Commission6* marked a major shift on the issue of "legal standing in public interest cases". In this case Ms. Priscilla Nyokabi Kanyua acting on instructions of *Kituo cha Sheria's* Board of Directors, which authorized *Kituo's* Advocates to represent the prisoners, filed the case on behalf of the inmates. After her letter dated 20th April

2010, as Kituo cha Sheria's Executive Director addressed to the Chairman of the Interim Independent Electoral Commission demanding that prisoners be registered was not acted upon by the Interim Independent Electoral Commission. She sought a declaration that prisoners should be allowed to vote in the Referendum on the Proposed Draft Constitution of Kenya. The Court in granting the prayers sought held that:

…That the Interim Independent Electoral Commission do gazette the prisons as polling stations and that they facilitate the registration of all eligible inmates within 21 days to enable those who wish to vote in a referendum to do so without any hindrance.

That the Attorney General and the necessary Authorities do facilitate the accessibility of prisons and the prisoners' identification documents to enable the Interim Independent Electoral Commission to register those inmates who wish to do so in the time specified…

Although there have been a few other judgments delivered in relation to standing, giving standing to a wide range of individuals, such as Okiya Omtatah Okoiti,8 Charle Omanga,9 Isaac Aluoch Polo Aluochier,10 and also to the Law Society of Kenya11 the judgment in the *Priscilla Nyokabi case* remains relatively the most influential judgment as far as public interest litigation is concerned. This is mainly because of the strength of the language used by the Court while delivering the judgment. The pronouncement of the Court seems to suggest that it is possible to initiate public interest litigation without founding the same strictly on the provisions of Articles

22 and 258 of the Constitution. This fact was illustrated by the Court when it quoted an extract from the case of *Albert Ruturi, JK Wanyela & Kenya Bankers' Association v The Minister of Finance & Attorney General and Central Bank of Kenya* –which was a pre-Constitution 2010 decision on *locus standi* in which the Court expressly stated that:

If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the Court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the Constitutional

guarantees, the right of access to justice entails a liberal approach to the question of 'locus standi'.

Another area that has seen the development of legal standing is the Anglo Leasing type cases. The Anglo Leasing cases are a total of eighteen (18) cases involving Government Contracts entered into by the Government of the Republic of Kenya for the supply of various passport printing system and security contracts.

Anglo Leasing type case filed in Kenyan Courts was precipitated by the judgment of the High Court of Justice Queens Bench (Claim No. 2006 Folio 881) which ordered the Government of Kenya to pay Universal Satspace (North America). Universal Satspace (North America) in September 2006 sued the Government over claims of $12,366,816 (Sh1.4 billion) at the Justice Queen's Bench Division Commercial Court in England. The English court entered judgment against the Government of Kenya after its defence and counterclaim was struck out.

On May 15, 2014 President Uhuru Kenyatta authorized the payment of the controversial Anglo Leasing debt. He ordered Treasury to pay Sh1.43 billion (US$16.4 million). The National Treasury paid out Sh1.4 billion to lawyers representing First Mercantile and Universal Satspace Limited, a firm connected to one Anura Perera, after losing to him in a London court in controversial circumstances. The payment was pushed through on the orders of President Uhuru Kenyatta. Perera immediately made an additional claim of Sh3.5 billion. These actions prompted the Law Society of Kenya to go to Court to seek conservatory orders staying the decision of the Government of Kenya to pay Universal Satspace (North America) LLC, in pursuance of judgment in High Court of Justice Queens Bench Claim No. 2006 Folio 881 in *Law Society of Kenya v Cabinet Secretary Treasury & another.*12 The Judge in refusing the application, pronounced himself thus:

I am alive to the fact that this is an ex-parte hearing and the judge hearing the matter will have the opportunity to assess the pith and substance of the allegations. Whereas I am satisfied that the matter is urgent, I am not convinced that ex-parte orders are merited without service to the respondents. The payment of such a sum in the magnitude of USD

12,366,816/00 is not so imminent as to demand an ex-parte order.

The LSK appealed the decision in the Court of Appeal. Court of Appeal Judges Philip Waki, Patrick Kiage and Lady Justice Agnes Murgor directed the Government to stop the payment after the application was filed. The Court ordered that:

Pending the hearing and application of the applicants (LSK) intended appeal and petition, there be conservatory orders staying payment of Sh3.5 billion and any other monies resulting from the 18 Anglo Leasing type contracts.

These 'baby steps' in recognition that *locus standi* ought to be interpreted broadly heralds a good beginning which it is hoped will define the Courts jurisprudence in the matter.

b. Enforcement of Fundamental Rights and Freedoms

Another area that has seen dramatic change of judicial attitude is Human Rights. Traditionally only civil and political rights were deemed to be justiciable. However, even in these areas, Kenyan Courts were reluctant to enforce Rights. Initially the odd argument was that enforcement was not possible owing to lack of Rules under the then Constitution. Ultimately, even with the so called 'Chunga' and 'Gicheru' Rules (eponymously named for serving Chief Justices Bernard Chunga and Evans Gicheru) were made, little happened to herald a new era.

In the pre-Constitution 2010 days when economic, social and cultural rights were deemed to be aspirational Kenyan Courts deemed them non-justiciable and effectively considered them outside of the purview of adjudication. Today however, judicial attitude has changed and recent

decisions attest to this.

The protection and promotion of human rights creates legal obligations on the State to ensure everyone enjoys rights. In the realm of civil and political rights this has been actively protected as opposed to economic social and cultural rights. The protection of economic, social and cultural rights together with the principle of non-discrimination puts focus on the most excluded, discriminated and marginalized groups in society. This assertion has been judicially enunciated

in *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*where the

High Court was called upon to determine whether a Government policy restricting the number of pupils from private Primary Schools who could join National High Schools was discriminatory and in violation of the right to education. The Court held that:

The inclusion of Economic, Social and Cultural rights in the Constitution is aimed at advancing the Socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources…

Further, in *Mathew Okwanda V Minister of Health and Medical Services & 3 Others14* while quoting excerpts from the earlier decision of *Anarita Karimi Njeru v Attorney General15* established the principle, that in matters concerning enforcement of fundamental rights and freedoms, a petitioner must plead with particularity that of which he complaints, the provision said to be infringed and the manner in which the particular right is violated. This principle is correct.

The issue of progressive realization of economic and social rights has also been dealt with in a number of cases in Kenya. In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others***,17** Mumbi Ngugi J. observed that:

The argument that socio-economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21

and 43 require that there should be 'progressive realization' of socio-economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights…. Its obligation requires that it assists the Court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.

Similarly, it has been held in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya*

Railways Staff Retirement Benefits Scheme & 3 others18 (hereinafter the Muthurwa Case) that

… it is now an accepted cardinal principle of constitutional interpretation that the entire Constitution must be read as an integrated whole, and that no one particular provision destroys the other but each sustains the other. This is what has come to be known as the rule of harmony; rule of completeness and exhaustiveness and the rule of paramountancy of a written Constitution.19

In the case of *Okiya Omtatah Okoiti V Attorney General & 2 Others*,20 the gravamen of the case was that a play known as ***Shackles of Doom*** to be performed by Butere Girls High School at the

2013 National Drama Festival that were to be held in Mombasa from 16th to 24th April 2012 was

banned. The Applicant argued that this case concerned the freedom of speech and expression protected under Article 33 of the Constitution and the only remedy the Court could issue to secure that right and freedom of expression for the public was to issue the mandatory injunctions

prayed for in the motion. Counsel for the Applicant drew the Court's attention to the fact that Kenyans fought hard for freedoms enshrined in the Constitution and thus such a ban could not be permitted to stand as it undermined the freedoms protected in the Bill of Rights. The application was allowed.

While the cases cited above are only a sample, they demonstrate the Courts new attitude towards socio-economic and cultural rights which are now recognized as justiciable.

c. Role of the Attorney General in Extra Governmental Litigation

The office of the Attorney General (AG) is established under Article 156 of the Constitution of Kenya, 2010. Article 156(4) establishes the AG as the principal advisor to the Government and gives the AG the authority to represent the National Government in Court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings. Article 156(5) gives the AG the power, with the permission of the Court, authority to appear as *amicus curiae* in any civil proceedings to which the Government is not a party. Further the Office of the Attorney General Act No. 49 of 2012 spells out the functions of the office to include:

i.Advising Government Ministries, Departments, Constitutional Commissions and State

Corporations on legislative and other legal matters;

ii.Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies; and

iii.Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.

Today however, Kenya finds itself in a unique and unenviable situation where its President and Deputy President are indicted at the International Criminal Court (ICC) for crimes against humanity charges ensuing out of the 2007/2008 post-election pogrom. Consequently, the Attorney General has had to travel to the Court to give clarifications on what the Kenyan Government is doing to co-operate with the Court as had been requested by the Prosecutor regarding the two accused persons.

Further, the AG has also purported to defend the two leaders locally where they have been sued in their private capacities as was the case in *Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & Another*.21 Mr. Aluochier filed a petition in the High Court challenging the Presidency of Uhuru Kenyatta and his deputy William Ruto. According to him, the two should not have been nominated for election to the highest offices on the basis that they had previously violated the Constitution and should have been barred from the nominations.

His argument was that between August 27, 2010 and August 2011, both Uhuru and Ruto held double positions as Cabinet Ministers and officials of political parties contrary to Article 77(2) of the Constitution. The Article provides that any appointed State officer shall not hold office in a political party. The petitioner argued that the two should have then been disciplined for contravening the law. And under Articles 75(2) and (3), the disciplinary action would have ensured they were not cleared to run for the seats of President and Deputy President. He has actually asked the court to declare that the two should not be holding State offices.

Though the petition was against Uhuru and Ruto in their private capacities, the Attorney General joined the suit to defend them. On October 20 2013, Aluochier filed an application seeking determination by the court on whether the AG could defend the two leaders in a private case.

He made a strong argument that under Article 156(6) of the Constitution, the AG can only represent the Government and the public in civil proceedings and not individuals sued in their private capacities. He noted that there was no provision under the Office of the Attorney-General Act22 allowing him to represent individuals in Court:

He could only join the case as an 'amicus curiae' and not in any other capacity. His purported representation of Uhuru and Ruto should be declared unlawful and his appointment as legal counsel be struck off the record. Said the petitioner.

However, the AG, through Senior Deputy Chief Litigation Counsel filed an objection to the application, saying he could represent the two respondents. The AG argued that under Article

156(6) of the Constitution, the Attorney-General has a wide mandate to promote, protect and uphold the rule of law and defend the public interest. It is within his discretion to determine when and to whom to offer his legal services in cases of public interest. She argued that where any proceedings may affect the rights, property or profits of Government, then he had the power to intervene as a counsel, even where a public officer had been sued in a private capacity.

Since the issues raised in the petition revolve around constitutionalism, rule of law and public interest, the private and official capacities of Uhuru and Ruto were fused and the AG could properly defend them.

But presiding Judge Isaac Lenaola dismissed the objection by the AG:

The respondents are presently part of Government but the actions complained of really turn on their past… I do not see how those actions can be termed as actions of the National Government to attract representation in Court by the Attorney General.

In the Kenyan context, the two levels of Government; national and devolved, form the Government of Kenya and the Constitution deliberately limited the role of the Attorney General to legal proceedings involving the National Government, whereas the devolved governments are left to seek their own legal representatives. But it must be noted that his advice as opposed to representation is to "the Government" in the wider context as defined above.

Ms Munyi has argued that there is "public interest" involved in the present petition and since the AG is enjoined to uphold the public interest, then he should be allowed to appear and defend the respondents. I disagree. The question of "advise", "legal representation" and "public interest" cannot be lumped together because the Constitution has demarcated them as such. Whereas the AG is enjoined to uphold the public interest in the discharge of his mandate, the Constitution specifically limited his role as "advocate" and one cannot properly import public interest as a basis for legal representation.

d. Actio Popularis in Abstracto

An *actio popularis* was an action in Roman penal law brought by a member of the public in the interest of public order.The action exists in some modern legal systems. For example, in Spain, an *actio popularis* was accepted by Judge Garzón in June 1996 which charged that certain Argentine military officers had committed crimes of genocide and terrorism. The actions were brought by the Free Union of Lawyers, *Izquierda Unida* and the Madrid Argentine Association for Human Rights: private citizens and organizations who were not themselves the victims of the crimes in the action and who proceeded without the sanction of the public prosecuting authorities. In India, public interest litigation has been used to guarantee several human rights, including the right to health, livelihood, free and compulsory primary education, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and several rights of under-trials, convicts and prisoners.

In Kenya, the history of *actio popularis in abstracto* or what is locally known as Public Interest Litigation (PIL) is ultimately linked to the early days of Public Law Institute whose attempt in engaging in PIL introduced a new approach to litigation. Some of its landmark cases include the *Maathai Cases26* during the hey days of the struggle for expansion of political space. The Law Society of Kenya (LSK) also attempted to engage in PIL. However, these spirited attempts were hamstrung by unfriendly laws which lent themselves to narrow interpretations.

With the advent of the Constitution of Kenya 2010, PIL has been enhanced. Traditionally, Courts frown upon litigation in the nature of *actio popularis in abstracto* on the ground that an interest must crystallize to justify litigation. However, with the promulgation of the Constitution 2010, a new vista has been opened and public interest litigation has received new impetus. The cases that come to mind post 2010 Constitution are the Okiya Omtatah cases, Charles Omanga cases and Isaac Aluoch Oluochier cases.

Okiya Omutatah has filed a number of cases but a few examples will suffice. In *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others*27 which was a consolidated case, the judgment dealt with three constitutional petitions which challenged the constitutionality of the decision of the National Assembly to nullify certain Gazette Notices issued by the Salaries and Remuneration Commission (SRC) in respect of salaries for state officers. The petitioners also questioned the constitutionality of several Acts of Parliament relating to the terms of service of Members of the National Assembly. The High Court pronounced itself thus:

Having found that the National Assembly had no mandate to make resolutions nullifying the Gazette Notices issued by the SRC, and in light of our other findings in relation to the issues for determination in this matter, we make orders and issue declarations as follows:

'That the National Assembly exceeded its mandate by purporting to annul the Gazette Notices issued by the SRC on 1st March, 2013. Its decision was therefore both unlawful and unconstitutional.

That in view of the provisions of Article 230 and 260 of the Constitution of Kenya 2010,

the National Assembly Remuneration Act Cap 5 is unconstitutional.'

Further, in *Okiya Omtatah Okoiti & another v Attorney General & 7 others*28 which was a Preliminary Objection raising one point of law; that the 1st Respondent, the Attorney General, cannot represent an independent Commission, the 3rd Respondent (the National Police Service Commission) and a body corporate, the Public Procurement Administrative Review Board, the

8th Respondent, in these or any other Court proceedings. The Judge held that:

I should also state that the Preliminary Objection was generally narrowly argued by the parties and the scope of the issue was thus limited but I should say this in passing; there is no bar to Commissions in the nature of their mandates to hire counsel when funds and circumstances allow. In fact the better and viable option would be for them to hire in- house counsel who can adequately represent them in Court when and if necessary. I am aware for example that the

Ethics and Anti-Corruption Commission has routinely done that. But the Attorney-General also has a mandate to represent the national interest in Court proceedings and where Commissions are minded to seek his representation, I see no bar either. To hold otherwise would be impractical and illogical given the structure of our Constitution. But where for example in specific cases the Attorney-General has to defend a claim by a Commission, for obvious reasons he cannot act and one cannot look at the office in the same way a law firm is looked at in the circumstances.

In the end, and given the narrow yet important issue raised, I find no merit in the objection and will overrule it.

The Preliminary Objection was thus dismissed. Mr. Isaac Aluochier has also been active in the public interest arena. A sampling of some of his efforts is therefore appropriate.

In *Isaac Aluoch Polo Aluochier V Independent Electoral And Boundaries Commission (IEBC) and 19 others*29 where the petitioner filed his petition on 5th February, 2013, exactly 27 days before the national elections for the Presidency, the Legislature and the Counties under a new constitutional set-up. He was contesting the validity of the nominations and approvals made by the Independent Electoral and Boundaries Commission (IEBC) in respect of candidature for the office of President. The petitioner questioned the actions of the sponsoring political parties in

their initial nominations of candidates who would, at the time, be classified as State Officers in the terms of Article 260 of the Constitution of Kenya, 2010. The Supreme Court ruled that it lacked jurisdiction to hear the matter and dismissed the application.

In the case of *Isaac Aluoch Polo Aluochier V Independent Electoral and Boundaries Commission & 19 Others*30, the Applicant applied to be enjoined in the 2013 Presidential Election Petition at the Supreme Court, but the Supreme Court rejected the application stating that:

After giving this application due consideration, we have come to the conclusion that it cannot be allowed at this stage. While we have a commitment to hear and determine the three petitions on the basis of which the Court has been moved, time is of the essence – and judicial notice is to be taken of this fact. In our assessment of the present setting for the resolution of the issues before us, the belated application now being brought can only cause unnecessary delay. Accordingly, we hereby disallow the application.

Another active public interest litigator is Mr Charles Omanga.

In *Charles Omanga & another v Independent Electoral & Boundaries Commission & another &*

*another*31the Applicant sought the following declarations:

(a) A declaration that the provisions of Section 43(5) of the Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State or public officers is discriminatory, accords an unfair

advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional.

(b) A declaration that the requirement under Section43(5) of the Election Act, 2011 impacts or affects the exercise of the right of the Kenyan citizens to a free and fair elections where the electorate including the Petitioners' can fully and without let or hindrance exercise the political rights under Article 38 of the Constitution.

(c) A declaration that the 1st Respondent herein; the Independent Electoral and Boundaries Commission cannot properly exercise its mandate as an impartial arbiter or referee of the elections as envisaged under Articles 81 and 88(4) of the Constitution under the circumstances in which some of the prospective candidates deemed to be in public service are required to resign seven (7) months prior to the elections.

(d) An Order of Injunction permanently suspending the operations or implementation of Section 43(5) of the Elections Act, 2011 and restraining the 1st Respondent from enforcing the requirement for State officers/public officers to resign seven (7) months prior to elections if they intend to take up or participate in parliamentary or other elections under the current Constitution.

The Court in the nature of an *obita dictum* lauded the Applicant for having filed this case and observed that:

…the Petitioners should be lauded for being vigilant and ensuring that whenever an opportunity arises, they should place before this Court important constitutional questions for interpretation. Our nascent Constitution requires warriors of constitutionalism and crusaders for its implementation.

The Court concluded that:

I am cognizant that this matter is of considerable interest to public officers who may wish to run for elective positions. Let this judgment sound as a preparatory gong to them; they cannot have one leg in public service and another at their elective area. The Law was designed to aid them make up their minds on where they want to maximize their energies. Seven months before the election date is sufficient time for them to prepare themselves to meet their fate at the election box. A longer period would be unreasonable and a shorter period would be more unreasonable.

As for the Petition before me, the same was well presented and argued; the responses were concise and well thought out but to my mind, the petition does not meet the test I have elsewhere set out above and must fail.

Further, in *Charles Omanga & 8 others v Attorney General & another*32 which was a consolidated petition; the two petitions were consolidated because they relate to the 2nd respondent who is the Cabinet Secretary in charge of the Labour portfolio. He is a State Officer within the meaning of Article 260(k) of the Constitution. In *Petition No. 29 of 2014, Charles*

Omanga v Hon Kazungu Kambi and the Attorney General, the petition sought the following principal orders:-

i. *An order of access to the 1st respondent's self-declaration form.*

ii. *An order compelling the 1st respondent to produce his university degree.*

The issue for determination in this matter was whether the petitioner was entitled to the 2nd Respondent's self-declaration and university degree certificate under **Article 35(1)** of the Constitution. **Article 35** provides as follows:

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

The Court held that:

The petitioner's case is that he seeks to enforce the provisions of Article 73 in respect of the Cabinet Secretary. Article 73 is part of Chapter Six of the Constitution which deals with leadership and integrity. It is not part of Chapter Four and the petitioner has not demonstrated that the he requires 2nd respondent's degree certificate to exercise or protect any of his rights or fundamental freedoms enumerated in Part 2 of Chapter Four

of the Constitution. The petitioner's petition must therefore fail.

The emerging jurisprudence is that Courts have now developed a new attitude towards public spirited persons and their cases are heard and determined on merit.

e. Election Petition Cases

In Kenya, before the advent of the current Constitution, the trial Court in Election petitions was always a Court of first and last instance. Fortunately or unfortunately, the promulgation of the Constitution and the passage of the Elections Act33 have brought in avenues for appeals . Disputes arising from parliamentary and gubernatorial elections are handled by the High Court and a restricted right of appeal to the Court of Appeal, confined to 'issues of law', is allowed. The Constitution requires the High Court to resolve electoral disputes within six months and appeals to the Court of Appeal must also be decided within six months.

In the past, delays in resolving parliamentary disputes were so severe that Parliamentary terms elapsed before some of the petitions were decided. This has now been addressed by setting a time limit within which cases must be determined. However, the window of appeals has given rise to decisions of the Court of Appeal conflicting with those of the Supreme Court.

After the 2013 General Elections most of the appeals decided by the Court of Appeal found their way to the Supreme Court and so far the Supreme Court has quashed five of them with stinging indictments and advice on 'points of law' to the Court of Appeal.

Ironically, the Supreme Court has in most of these cases agreed with the High Court, whose decisions the Court of Appeal had quashed. This presents the question as to whether there is an emerging jurisprudence from these Courts or whether it is a case of schizophrenic decisions borne out of a silent 'jurisprudential civil war' between the Supreme Court and the Court of Appeal. A sampling of some of the decisions will help us appreciate the point.

We start with the *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others,34 (Peter Munya* case). In this case the Applicant was declared the duly elected Governor of Meru County after the Meru gubernatorial elections held on 4th March, 2013. The 1st Respondent, a registered voter in North Imenti Constituency in Meru County, filed a petition in the High Court at Meru on 26th March 2013 seeking a nullification of the election results. The Petitioner alleged that the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence, discrepancy in the results announced, and contraventions of the regulations governing elections.

The Petitioner sought, *inter alia* (i) an immediate scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies; (ii) a declaration that Mr. Munya, was not validly elected as Governor of Meru County; and (iii) a declaration that the election for Governor of Meru County was a sham and was, therefore, void. The respondents in that case argued that the elections were free and fair, and that any non-compliance with the law was insignificant, and did not materially affect the outcome of the election.

The High Court in Meru dismissed the petition and this precipitated an appeal to the Court of Appeal, which set aside the High Court decision and nullified the gubernatorial election holding that:

The declared results of the Meru gubernatorial elections were not accurate, verifiable and accountable; the tallying process was not efficient and accurate; the trial judge erred and misdirected himself in finding that a margin of 0.819% could be described as wide; quantitatively, the errors and irregularities disclosed materially affected the results of the elections, given the margin between the winner and the runner-up; the trial judge erred in denying the appellant the right to cross-examine one of the defence witnesses.

The Court of Appeal decision prompted the Applicant to appeal the decision to the Supreme Court which set aside the Court of Appeal decision and upheld the gubernatorial election. The Supreme Court observes:

… with specific reference to Section 85A of the Elections Act, it emerges that the phrase

'matters of law only', means a question or an issue involving:

(a) The interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence…

What emerges from the decision and subsequent ones is that the Supreme Court was trying to

'main stream' the Court of Appeal to follow the jurisprudence in the *Raila Odinga* case35 where The case arose out of the Presidential Elections that were held on 4th March 2013. A total of three petitions challenging the election of the President were filed by different parties on different dates. All three were consolidated and heard together. The first petition contested the inclusion of rejected votes in the final tally which, it was argued, had a distorting effect on the percentage votes won by each candidate. (Paragraph 8 of the Judgment). undue fidelity to technicalities of procedure took precedence over substantive law. This was the original sin. A series of cases determined by the Court of Appeal have suffered the Supreme Courts wrath as did the *Peter Munya* case, we sample a few.

In the *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others case36* which was an appeal against the Judgment of the Court of Appeal sitting at Kisumu, which overruled the decision of the High Court sitting at Homa Bay in dismissing an Election Petition. The outcome of that decision was the invalidation of the election of the appellant, as the duly-elected Governor of Migori County.

Among the grounds of appeal in this case was that:

The appellate Court misapplied the law in Article 163(7), when it lowered the standard of proof required to invalidate an election. The Court deviated from the well-established standard of proof in election petitions, and 'overlooked the Supreme Court decision in Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others, Petition No. 5 of 2013.'

The Supreme Court, in the *Raila Odinga37* case, had held as follows (paragraph 203), as regards burden of proof:

…a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond- reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.

The second petition sought to demonstrate that constitutional and legal safeguards on the election process were so breached that the accuracy and legitimacy of the electoral outcome was laid to open question. They sought to demonstrate that the electoral process was neither accountable nor transparent and its results are, therefore, non- verifiable. (Paragraphs 9-14 of the Judgment). The third petition sought to bring out the difference of actual registered voter, use of Green Book and introduction of Special register. The Petition also sought to bring to the attention of the Court the technological failure that cast doubt on provisional results and breakdown of BVR Kit on the polling day. It also alleged that massive electoral fraud and malpractice occurred. In short, the crux of the petition was a contention that the electoral process was so fundamentally flawed that it was impossible to ascertain whether the presidential results declared were lawful.

During trial and after the close of filing of pleadings, the Petitioners tried to introduce a 900 page affidavit detailing how the election process was flawed. The Court in arriving at its decision rejected the affidavit due to time limits.

Central to the Supreme Court's judgment regarding standard of proof in the *Raila Odinga* case was what the petitioners needed to prove and to what standard they should have proved it in order to get a remedy. The Court said that the answer to that question was "well exemplified" in Nigerian case law.38 Apropos of Nigerian inspiration, it concluded that a petitioner must prove that the law was not complied with and also that the failure to comply affected the validity of the elections. That is the legal burden. What is the standard of proof needed? The Court seemed unsure.**(Emphasis added).**

In principle, it said, this could be above a "balance of probability" but below "beyond reasonable doubt." This means a place in-between the standard in a civil case and that in a criminal case. Indeed, this is what was being pleaded in the *Okoth Obado appeal* at the Supreme Court.

However, regard must be had to Article 259 of the Constitution which provides that in construing the Constitution:

1) This Constitution shall be interpreted in a manner that:

a. Promotes its purposes, values and principles;

b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. Permits the development of the law; and d. Contributes to good governance.

The question therefore is whether the Court's interpretation in *the Raila Odinga* case can be construed to have promoted the Constitution's purpose, values and principles and whether it permitted the development of the law.

All election results are about data. There are no gradations of winning. Why, then, in principle, should exactness in electoral thresholds, say 50 per cent plus one and 25 per cent in at least half the counties impose on a presidential petitioner the duty to discharge a higher standard of proof

– than say an MP challenging a victor chosen on the basis of "a majority of votes cast?"

Or maybe this was the Court's method of radically curtailing the number of petitions that can be brought against the President-elect. Since most of the evidence of wrongdoing will be in the hands of the IEBC, or a similar body, it is extremely difficult to see how a petitioner could ever succeed.

This cannot be what Kenyans thought a new Constitution was meant to do, shield an elected leader from being subject to an election petition. In fact, it seems more likely than not, that Kenya will never have a run-off election so long as a candidate can, by hook or crook, get himself declared elected.41 The onerous standard of proof would be incredibly difficult to discharge.

Nevertheless, the Court of Appeal in the *Okoth Obado* case in its decision delivered on 28th

March, 2014 allowed the appeal. It set aside the Judgment of the High Court, stating that:

…the election of Governor, Migori County was so badly conducted that it failed to meet the constitutional and legal requirements of a free and fair election; and that the irregularities affected the results.

The matter was appealed to the Supreme Court which stated that the Court of Appeal had exceeded its jurisdiction by making conclusions as to matters of fact. The Supreme Court in its finding on this matter pronounced itself thus:

In making these observations, as we find, the appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act. The Court of Appeal accorded no deference to the High Court's findings on facts; and the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, with the exception of two polling stations, namely, Kengariso Primary School, and Ombo Primary School.

The heresy continued in *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission & 2 others42* this was an appeal from the Judgment and Order of the Court of Appeal of Kenya sitting at Kisumu (Onyango Otieno, Kiage and Murgor, JJA) which nullified the election of the Applicant as Shinyalu Member of Parliament.

The trial court, in this case (E.K. Ogola J) delivered its judgment on 4th October, 2013, holding that it would not be proper to nullify the election due to minor electoral errors and anomalies and in the light of the evidence adduced before it. The Court issued orders in the following terms:

that it would not be proper to nullify the election due to minor electoral errors and anomalies and in the light of the evidence adduced before it. The Court issued orders in the following terms:

(i) *The appellant herein was validly elected as Member of the National Assembly for*

Shinyalu Constituency, in a free and fair election…

On appeal, the Court of Appeal then delineated the following three issues as the central ones in the case:

i.the violence witnessed in Shinyalu Constituency, its extent and legal effect;

ii.the errors, irregularities, malpractices alleged, and whether they affected the result;

iii the legal correctness of reliance on a unilateral reconciliation of votes during the hearing, in lieu of the requested scrutiny and recount

After hearing the representations of counsel, considering the submissions filed, and evaluating the authorities tendered, the Court of Appeal delivered its judgment on 11th April, 2014 setting aside the judgment of the High Court. The appellate Court thus held:

The election in question did not conform to the high standards of probity and integrity set out in the Constitution. That non- conformity and non-compliance with the law doubtless affected the result of the election. The co-existence of non-compliance effect [sic] on the result must lead to such election being declared void, and we so declare. The judgment of the High Court dated and delivered on 4th October 2013 is accordingly set aside in its entirety. It is substituted by an order that the 3rd Respondent was not validly elected as the member of the National Assembly for Shinyalu Constituency in the election held on

4th day of March 2013. A certificate of this determination is hereby issued to the 1st respondent pursuant to Section 86(1) of the Elections Act.

The Supreme Court consequently set aside the Court of Appeal judgment and held that:

i The Petition of Appeal dated 16th April, 2014 is hereby allowed.

ii. The determinations made by both the High Court and the Court of Appeal are hereby annulled.

iii. The Certificate issued by the Court of Appeal in Kisumu Civil Appeal No. 51 of 2013 is hereby declared a nullity and is quashed.

iv. The status of the National Assembly seat for Shinyalu Constituency reverts to the 'status quo ante', as declared by the Independent Electoral and Boundaries Commission on 5th March, 2013.

Similarly in *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others*43 which was an appeal seeking to set aside the whole judgment of the Court of Appeal in *Civil Appeal No. 293 of 2013.* The High Court (*Mabeya J*), in a judgment dated 24th September 2013, dismissed the petition, finding that although several irregularities had been proven, the effect of those irregularities could not have affected the outcome of the election. Aggrieved by the High Court's decision, the

1st and 2nd Respondents, appealed to the Court of Appeal.

The Court of Appeal *(D.K.Maraga, J.W.Mwera & P.M.Mwilu JJ.A)* in its decision dated 23rd April 2014, allowed the appeal and set aside the judgment of the High Court, finding that the trial Court erred in finding that the irregularities did not affect the outcome of the election, and that the results of the election were *indeterminate*; the consequence of which – the election of Mr. Adam was subsequently nullified. Aggrieved by the judgment of the Court of Appeal, the Applicant filed an appeal to the Supreme Court.

In their submissions to the Supreme Court, counsel for the Applicant submitted that the appeal raised substantive issues of law, touching on both statute and constitutional law, and thus was not frivolous. He added that the Applicant was before the Court as a matter of right under Article

163(4) (a), and that his appeal satisfied the conditions set out by this Court's decision in the *Peter Munya* case for interlocutory orders pending the hearing of the substantive matter.

Counsel for the Applicant enumerated several grounds that were arguable including, that the Court of Appeal had acted beyond its scope under Section 85A of the Elections Act and considered matters of fact as opposed to matters of law, and it misinterpreted clear provisions of the law, including regulation 66(1) (2) of the Election (General) Regulations, 2012.

As has been the norm, the Supreme Court set aside the judgment of the Court of Appeal and upheld the decision of the High Court which had upheld the election results as had been announced by the IEBC.

The trend continued in *Mary Wambui Munene v Peter Gichuki King'ara & 2 others,*44 the 1stRespondent filed a petition challenging the outcome of the Othaya Constituency Electi on Results, which was dismissed with costs, and confirmed the Appellant as the duly elected member of National Assembly for Othaya Constituency. Aggrieved by the foregoing orders of the Election Court, the 1st Respondent appealed to the Court of Appeal which ordered for a fresh election and declared the election was full of election irregularities. Aggrieved by that decision, the Appellant filed an appeal before Supreme Court seeking to set aside the whole Judgment of the Court of Appeal nullifying her election as the Othaya Member of Parliament, which appeal was allowed.

Meanwhile, the Supreme Court had in (*Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR)* determined the issue as to when the time-limit envisaged under Article 87(2) of the Constitution is set in motion, and had declared Section 76(1)(a) of the Elections Act *ultra vires* the Constitution. The appellant sought to have the proceedings before the Court of Appeal and High Court declared a nullity on the basis of the Joho's decision.

Article 87(2) of the Constitution requires that election petitions for elections other than presidential elections, be filed within 28 days after the declaration of the election results by the Commission. Parliament had enacted a contradictory provision, in the form of Section 76(1)(a) of the Elections Act. In considering the effect of that provision, the Supreme Court declared Section 76(1) (a) of the Elections Act inconsistent with Article 87(2) of the Constitution.45 While the principle of timely disposal of election petitions was re-affirmed by the Court of Appeal, the same must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount.

The Supreme Court in its judgments has been keen to ensure predictability, certainty, uniformity and stability in the application of the law. That inclination was asserted in the case of *Jasbir Singh Rai and 3 others v The Estate of Tarlochan Singh Rai and 4 others,46* (the Rai case).

As noted, Section 76(1) (a) of the Elections Act was declared a nullity-a declaration that was clear as well as unqualified. Indeed, the Court of Appeal appreciated the sanctity of that declaration and dismissed the appeals before it in accordance with comparative judicial practice around the world.

Under the Constitution and even otherwise, the Supreme Court is naturally looked upon by the country as the custodian of law and the Constitution, and if the Court were to review its own previous decisions merely because another view is possible, the litigant-public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land.47

The above decisions by the Court of Appeal, which have found their way to the Supreme Court shows the emerging 'jurisprudential war' between the Supreme Court and the Court of Appeal. This is singularly important because of the doctrine of *stare decisis* which compels the Court of Appeal to comply with the decisions of the Supreme Court willy-nilly.

The question we should ask ourselves is whether the Supreme Court's judgment in the *RailaOdinga case* can stand the test of time.In the face of the Supreme Court-Court of Appeal cold war on the Election jurisprudence, it is our submission that the jurisprudence as represented by the Court of Appeal represents good law for fidelity to the constitutional test.

It is true that Election petitions are disputes in *rem* of great public importance, and therefore not ordinary suits. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent credible and consistent evidence.

Further, irregularities and non-compliance with the electoral law will not necessarily lead to invalidity of an election unless they affect the result of the election. This was long ago recognized in the English case of *Islington West Division Case, Medhurst V Lough and Gasquet*48 where Kennedy J, held that:

An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised, and acted upon, by the tribunals which have dealt with election matters.

Without prejudice to Islington jurisprudence, it is our argument that the Supreme Court so relaxed the standards in determining the Raila Odinga case that nullification of an election for want of compliance with the Constitution has become difficult hence the conflict between it and the Court of Appeal which applies a more stringent test.

e. Interlocutory Appeals in Election Petition cases: Blowing Hot and Cold

In the course of proceedings in the electoral disputes in the High Courts, interlocutory appeals in election petitions were filed in different Courts of Appeal in the country. The central issue in these appeals had been whether the Court had jurisdiction to hear interlocutory appeals in Election Petitions arising from rulings that were delivered by High Courts in in the cause of litigation. In almost all of these appeals, the appellants had sought *inter alia* orders for scrutiny and recount of the votes cast in all or some of the polling stations in Constituencies or polling stations or in the alternative, a scrutiny or recount of the votes cast in all of the polling stations in

those Constituencies or polling stations during the General Elections held on 4th March, 2013.

Most of these applications were dismissed and found their way to the Court of Appeals. One case in point is the *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others Case* where upon hearing the Motion for vote recount and scrutiny, the Honorable Judge (Ngaah, J.) by a ruling dated 6th August, 2013 dismissed the Motion and expressed himself thus:-

This court is convinced that it is capable of determining this petition, one way or the other, without scrutiny and recount of the votes cast for the election of member of National Assembly for Othaya. The reasons for this conclusion will be apparent in the court's judgment which, in my view, is the appropriate juncture at which the court can evaluate the evidence on record and

make particular findings or conclusions, a feat that would determine the outcome of this petition and therefore prejudicial to the parties if it were to be done in a ruling on an application such as one before court

Aggrieved by the ruling dismissing the Motion, the appellant by way of an interlocutory appeal moved the Court of Appeal seeking orders that the ruling of the High Court dated 6th August,

2013 be set aside and in its place an order be issued for the scrutiny and recount of all ballots cast in Othaya Constituency during the general elections held on 4th March, 2013.

As had been the norm in other cases, the respondents anchored their submission on lack of jurisdiction on the decisions of the Court Appeal in the case of *Ferdinand Ndungu Waititu – vs- Independent Electoral & Boundaries Commission & 2 Others. 49 The Court in the Waititu case had stated that:*

The Court of Appeal is not mentioned as an Election Court and that in itself means that in its mechanisms made to ensure timely settling of electoral disputes or in its legislation made to ensure that the electoral petitions are determined within limited six months period by the High Court, the Court of Appeal is not one of the courts empowered to hear interlocutory matters in connection with petitions challenging results of parliamentary or county elections.

The Respondents further cited the holding in the *Ferdinand Ndungu Waititu* case (*supra)* where the Court of Appeal differently constituted (Mwera, Musinga & Kiage JJ.A*)* held that:

Under Rule 35 of the Election Petition Rules, no appeal lies to this Court from an interlocutory order, ruling or direction by an Election Court.

A primary issue for consideration is whether *Rule 35* of the *Election Petition Rules* creates, establishes or limits the jurisdiction of the Court of Appeal to hear interlocutory appeals. The Rule stipulates that an appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules. These being appeals in relation to Election Petitions you ought to be cognizant of the decisions in *Muiya – vs- Nyaga & Others50* as restated in *Murage –vs –*

Macharia51 wherein it was held that Election Petitions are governed by a self-contained regime

and that the Civil Procedure Rules are inapplicable except where expressly stated. In the *Lillian*

*'S',52*the Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The Lillian 'S' case established that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself

jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.

The jurisdiction of the Court of Appeal for election purposes is fortified by *Section 85A* of the *Elections Act.* The jurisdiction of this Court to hear Election Petitions is restricted and narrowed to the extent that appeals lie only on points of law.

Section 85A of the *Elections Act* is a statutory provision, while *Rule 35* of the *Election Petition Rules* is a Regulation made pursuant to the authority donated to the Rules Committee under *Section 96 (1)* of the *Elections Act*. The *Election Petition Rules* are rules of procedure and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other Court for that matter can be created, established, limited or governed by a subsidiary legislation more particularly a Regulation and Rules of procedure made by the Rules Committee.

In the *Ferdinand Waititu* case, the Honourable Judges of Appeal opined and stated that:-

A party aggrieved by an interlocutory order must await the delivery of the final judgment by the High Court then file an appeal to this Court.

In my humble view, the implication of the above statement by the Honourable Judges is that there is a period of delay or deferment of appeal to await the final judgment and decree of the High Court; and that passage or lapse of time can confer jurisdiction to the Court of Appeal to hear an interlocutory appeal where Election Petitions are concerned.

It is my considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present *ab-initio* or absent forever. Further, *Rule 35* of the *Election Petition Rules* does not oust the jurisdiction of the Court of Appeal to hear interlocutory appeals. It is not only upon final judgment or decree of the High Court being made, that the Court of Appeal acquires or assumes jurisdiction: A judgment and decree of the High Court cannot *ipso facto* confer or vest jurisdiction to the Court of Appeal. My considered view is that the Court of Appeal always has jurisdiction to hear appeals in interlocutory matters arising in an Election Petition; and that it is only that the jurisdiction to hear such a matter is delayed or deferred and not ousted. The issue is not absence of jurisdiction but deferred or delayed jurisdiction.

Further, it is my view that *Section 80 (3)* of the *Elections Act* does not oust the jurisdiction of the Court of Appeal to hear interlocutory matters of law arising in an Election Petition rather the Section must be read with *Articles 105* and *164 (3)* of the *Constitution*. *Section 80(3)* in the context of *Articles 105* and *164 (3)* of the *Constitution* simply delays the exercise of the appellate jurisdiction to such a time when the constitutional time lines for hearing and determining an Election Petition by the High Court has expired. In this context, all interlocutory appeals that could be preferred in an Election Petition are deferred and delayed and should be raised as

grounds of appeal in any substantive Election Petition Appeal.

Interestingly, in *Jacob Mwirigi Muthuri v John Mbaabu Murithi & 2 others* which was an application to the High Court to stop an order of scrutiny of votes and stay proceedings of the lower court pending the hearing and determination of the appeal, the High Court ruled that it had jurisdiction to hear interlocutory applications from Magistrates Courts hearing Election Cases. The learned Judge expressed himself thus:

This is an interlocutory application for stay of an order pending an appeal against the order made by a Petition Court. It is therefore both urgent and critical…

…this Court has power to entertain, hear and determine an interlocutory application arising from a Magistrates Election Court. The Rule provides that the High Court will have same powers and perform same duties conferred on the Court exercising its original jurisdiction. That means the laws that donate power, duties which and provide the procedure to be applied by the High Court in exercise of its civil appellate jurisdiction apply. Order 42 Rule 6 of the Civil Procedure Rules provides for stay in case of appeal and gives the parameters within which such order can be made.

The kind of circumspection and approach taken by the Court of Appeal on this matter as opposed

to the High Court's bolder approach in the *Jacob Mwirigi Muthuri v John Mbaabu Murithi & 2 others (SUPRA)* justifies our claim of judicial schizophrenic.

3. Independence of the Judiciary: Innovation or Schizophrenic?

The foundation of the principle of Judicial Independence rests on the doctrine of separation of powers. The rule of law as an element of constitutionalism depends more upon how and by what procedure it is interpreted and enforced by the Judiciary as an independent arm of the Government.55 Constitutionalism betokens limited Government under the rule of law.This was elaborated by Chief Justice Brian Dickson of the Supreme Court of Canada when he said that:

The role of the Courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.57

Judges play a role in balancing competing interests at a constitutional level.58 In *Liyanage V R59* the Privy Council decided that the arrangement of the Constitution in parts among them one headed ''Judicature'' demonstrates an intention to separate the judicial power from the Legislature and the Executive.

The doctrine of judicial independence is underpinned by several International Instruments.60 The Basic Principles of the Independence of the Judiciary61 calls on states to guarantee the independence of the Judiciary through Constitutional or National Law and recommends institutional arrangements related to the selection process, tenure, and discipline of Judges/Magistrates. The Commonwealth (Latimer House) Principles on the Three Branches of Government similarly emphasizes that an independent, impartial, honest and competent Judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

In Kenya, judicial independence has constitutional underpinning in Article 160 of the Constitution of Kenya 2010 which provides that:

(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

An independent Judiciary can dispense justice impartially and fairly based on the rule of law and therefore is the cornerstone of democracy. In their book, 'The Constitution of Kenya, 2010: An Introductory Commentary'63 Prof PLO Lumumba and Dr Luis Franceschi rightly, while making a commentary on the above provisions of Article 160 of the Constitution, rightly state that:

A close interrogation of the provisions reveals a marked intention to protect the Judiciary from devices that have been used in the past to undermine the independence of the Judiciary in Kenya. There are two types of independence- institutional and decisional independence… Decisional independence is the idea that Judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions.

Judicial Independence must therefore be viewed from the standpoint of citizens. Their lack of confidence in the Judicial Institution and the Judges can seriously affect the delivery of justice. The Chief Justice of Canada explained the importance of Judicial Independence:

Judicial independence is valued, because it serves important societal goals – it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the Judiciary, which is essential to the effectiveness of the Court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal, served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

Besides independence of the judicial institution, the independence of the Judges is not an overemphasis. Various instruments emphasise individual Judges' independence or rather impartiality as stated by the Canadian Supreme Court in the case of *Valiente v. The Queen.*The Universal Charter of the Judge establishes that:

[t]he independence of the Judge is indispensable to impartial justice under the law. It is indivisible. All Institutions and authorities, whether national or international, must respect, protect and defend that independence.

In view of the personal independence of the Judges, their decisions should be insulated from extraneous pressure. Judges should be moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations. Individual Judges should be free to decide cases free from fear of negative personal consequences, even if the predictable result of such decisions is quite negative for the Judiciary as a whole. Lord Atkin illuminated this in *Liverside v. Anderson69* when he boldly stated that:

…the law is not silent. They may be changed, but they speak the same language in war as in peace. It has been one of the pillars of freedom, one of the principles of liberty…that the Judges should not be respecters of persons that stand between the subject and any attempted encroachment on his liberty by the Executive, alert to see that any coercive action is justified by law.

When judicial majorities attempt to stifle minority views this can be construed as a threat to independence, the behaviour of Judges who advocate or choose to conceal their views to go along with the majority could also be guilty of threatening Judiciary.70 Judges should be free to interpret the law independently, objectively and impartially, without any undue pressure from external forces or internal pressure. The UN Basic Principles states that: "[…] Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the Judiciary".

A Judge is likely to be a dispenser of justice if he is aware of the currents and passions of the time, the development of technology, and the sweep of events. To judge in the real world a Judge must live, think, and partake of opinions in the real world. Judges are trained lawyers and some having practiced for quite some time. Nevertheless, the skills of judging should be up above those used by advocates. The task of judging implies a measure of autonomy which involves the Judge's conscience alone.

Whenever judicial independence is raised, focus has been on the constitutional external threats from the Executive, the Legislature and even the media. However, the other internal aspect of judicial independence which involves Judges' impartiality by rightly dividing the law is seldom mentioned, but this internal pressure can insidiously gnaw judicial independence.

The independence of the Judiciary and the Rule of Law are so closely interwoven that they form the structure upon which the democratic system is sustained. Sir Gerrard Brenan, Chief Justice of Australia, while addressing some newly appointed Judges said:

It is only when the community has confidence in the integrity and capacity of the Judiciary that the community is governed by the Rule of law.

What we should not lose sight of is that judicial activity is increasingly falling within the purview of public scrutiny. In the case of *Ambard v. Attorney General of Trinidad and Tobago* Lord Atkin said, and I quote:

Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful comments of the ordinary man.

To enhance judicial independence and authority, it behoves all citizens to respect judicial decisions. It is unfortunate, that in the recent past a trend has been emerging where Court Orders are disobeyed without consequences by public officers who in their exaggerated and jaundiced think their offices are too important to be supervised.

4. Conclusion

Kenya, thanks to the relentlessness of the people's democratic struggles, enacted for herself the current Constitution. The Judiciary in general and the Appellate Courts in particular, has a central role in the protection of the Constitution and in the realization of its fruits so these may inure to all within our borders.75 The Courts should thus carry out their functions of interpreting the law with due regard to the law and make sound decisions.

Prof Dan Nabudere making reference to statement by Picho Ali, then a Minister in Uganda in the 1960s stated that:

…After everything is said, I think we ought to agree- and I here agree with Picho- that there is no such thing as the independence of the Judiciary anywhere. The Judiciary has always been created by the politics of the economic base and not vise-versa. So it is always pointless to talk about the Judiciary sitting in judgment of the economic base and its politics and hence its ideology. Why is the judiciary still colonial-oriented in spite of such ideology (if any)?…76

This statement ought not be true in Kenya if the Judiciary follows its mandate as set out in Article 159 of the Constitution of Kenya 2010 which establishes the Judicial Arm of the Government and further states that:

1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

a. Justice shall be done to all, irrespective of status;

b. Justice shall not be delayed;…

f. The purpose and principles of this Constitution shall be protected and promoted.

Article 160 of the Constitution affirms the principle of independence of the Judiciary and provides that in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

Further, the fundamental reasons of taking disputes to Court is not whether one wins or loses in Court it is whether the loss or win is seen to be just. Parties look to the reasons that the Court gives to see why they have lost. Judicial reason is the primary tool by which we hold Judges to account. The public esteems the Judges by the soundness of the reasons that they give for their decisions.

It therefore follows that a Constitution is an organic instrument and must thus be interpreted broadly, liberally and purposively so as to avoid 'the austerity of tabulated legalism'.78 When

this is done, it enables it to continue to play a creative and dynamic role in the expression and the achievement of the ideas and aspiration of the nation, in the articulation of the values bonding its people and in disciplining our Government thus developing sound jurisprudence and not incongruent judgments on similar issues which bespeak schizophrenic rather than innovation.

Even in the face of schizophrenic, the verdict of that monumental change has taken place. Going forward, even though the Courts have committed sin in their judgments, redemption is still possible; Redemption can come when the Supreme Court and the Court of Appeal revisit the above issues in their subsequent judgments.

The apparent schizophrenia conceals innovation in critical areas which are important for the development of jurisprudence. These are early days, and we look forward to the days when each and every member of the bench will write their own decisions; they may arrive at the same verdict but with different reasoning.